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A N
HISTORICAL ESSAY
ON THE
JURISDICTION
OF THE
COURT of CHANCERY;
And Incidentally of the other COURTS.

*Non ut aliquid novi attulerim, sed ut ea quæ in infi-
nito pæne occurrunt sub uno aspectu ponerentur.*

Cic. de Petit. Consulat.



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Law
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AN
HISTORICAL ESSAY

OF THE

JURISDICTION

OF THE

COURT OF CHANCERY

IN





INTRODUCTION.

INtending to make some Enquiry into the Original of the Chancery, as a Court of Equity, it seemed most natural first of all to consider its primitive Business and Institution. And this appeared to be so linked and interwoven with the History of the other Courts, that it was hardly possible to separate the Knowledge of any one of them from the rest. Thus by degrees, I was led up to that common Spring and Fountain of Jurisdiction, of which they were all apparently but so many Streams, or Rivulets.

But as the Mind takes a different Course in the Investigation of Truth, from the delivering it to others; and that which was first in the Invention, is ever last in the Execution: so in digesting these Materials, a quite contrary Method must be pursued, from that which is before described. And thus our Treatise will divide itself into four Chapters. In the first of which, we will speak of Ju-
B
risdiction,

INTRODUCTION.

jurisdiction, as considered abstractedly in itself, or in the Person of the Sovereign; in the second, of the Place of Judicature; in the third, of the *Justitia*, or Chief-Justice of *England*, from whose Office most of the other Courts at *Westminster* are derived; the fourth and last, we have reserved for the Chancellor, and Court of Chancery.

As Jurisdiction therefore is one of the Works or Actions of a State, it will be necessary to take a View, in the first place, of the inward Fabrick and Constitution of Political Societies, that we may discern of what Use it is, and what Relation it bears to the Whole.



PART



P A R T I.

Of the Courts of Common Law.

C H A P. I.

Of JURISDICTION.

SECT. I. *Of the inward Structure and Constitution of Civil States.*



OW the most proper ^a Definition of a Civil State seems to be this, that it is a Compound Moral Person, whose Will, united and tied together by those Covenants, which before passed among the Multitude, is deemed the Will of all, to the end that it may use and apply the Strength and Riches of private Persons, towards maintaining the common Peace and Security.

^a Puff. lib. 7. cap. 2. sect. 13. Domat. tom. 2. book 1. Moor 794. by the Earl of Northampton, in the Case of the Union of the Realm of Scotland with England. Fortescue cap. 13, 14. Locke's Essay on Civil Government, cap. 10. fol. 265. Aristot. Polit. lib. 4. cap. 4. & lib. 7. cap. 8.

An Historical Essay on the

Hence a political Society may be conceived as an artificial Man; in which, the Sovereign is the Soul, as giving Life and Motion to the whole Body: the Magistrates and the other Officers, artificial Joints; Rewards and Punishments, fastened to the Seat of Sovereignty, and by which every Member is moved to the performance of its particular Duty, the Nerves, which do the same in the Body natural; the Wealth and Riches of particular Members, are the Strength; *Salus Populi*, the People's Safety, its Business; Counsellors, by whom all things needful for it to know are suggested to it, are the Memory; Equity and Law, an artificial Reason; Concord is Health; Sedition, Sicknefs; and Civil War, Death. Lastly, the Pacts or Covenants by which the Parts of this Body Politick are cemented together, resemble the Divine *Fiat*, or the *Let us make Man*, pronounced by God in the Creation. From whence we may gather by the way, that the Form of Government is the same in the State, as in a human Body, the Structure and Disposition of the several Parts and Members. And what the Parts of Sovereignty are, may plainly be discovered from the Nature and End of Civil States.

S E C T. II. *Jurisdiction an Incident inseparable to all Governments.*

AND thus all Kingdoms^a, in their Constitution, are invested with the Power of Justice, both according to the Rule of Law and of Equity. For Jurisdiction, as the
Ci-

^a Hobart 63. per Hobart, *in the Case of Martyn and Marshall*, v. Key. Corvini Digest. lib. 2. tit. 1. de Jurisdictione.

1. Bullstr. 211, 212. per Fleming C. J. *in the Case of Cox*, v. Grey.

Civilians say, is a Power of judging, introduced into the Publick out of necessity. ^a Hence, with us all the King's Courts, are held to be of common Right, and to have been time out of mind; so as a Man cannot know which of them is the antientest Court.

^b And upon this ground it is, that the Chanceries in *Chester* and *Durham*, are incident to Counties Palatine, which had *Jura Regalia*. So the County Palatine of *Lancaster*, and Principality of *Wales*, have Courts of Equity as well as Law.

^c And the Reason and Foundation of this Necessity is apparent. For since under the exactest System of Laws, there arise frequent Disputes about the right Application of them to particular Cases, and many Circumstances are to be considered, before a Fact can be pronounced illegal, or the Author of it convicted; on this account, the judiciary Power is supposed to come in to the Assistance and Support of the legislative and vindicative. And here it is necessary, that the Judge have a Liberty of excepting such Matters, as it may fairly be presumed the Legislator himself would have excepted; and rather to follow the Intent and Meaning, than the strict Letter of the Law, which is the Office of Equity.

^a 9 Ed. IV. 63. by all the Judges in Cam. Scacc. same cited 4 Inst. 79.

^b Hobart 63. per Hobart, in the Case of Martyn and Marshall, v. Key. Spelman's Gloss. tit. Comes Palatinus. Selden's Titles of Honour, Part 2. cap. 5.

2. Vern. Case 438. Trelawney, v. Williams, agreed per Cur. 1. Saund. 73. Peacock v. Bell. ruled.

^c Puff. lib. 7. cap. 4. sect. 4. lib. 5. cap. 12. sect. 20. Domat. Book 2. tit. 4. sect. 1. par. 4.

SECT. III. *This was originally in the King, as Sovereign.*

LET^a us see then who it is that first and principally ought to give Judgment? And it is to be known that this is the King himself, and no other, if he alone were sufficient for the Work; since to this he is bound by virtue of his Coronation-Oath^b. And Jurisdiction is said to be the greatest Dignity that belongs to the King, who is the sole Fountain of Justice within his Realm, and deservedly styled *Capitalis Justiciarius Angliæ*, having the Power of judging, not only according to the Rule of Law, but of Equity; both of which being in the King, as Sovereign, were afterwards settled in several Courts, for the more convenient Exercise of Justice, and for the Ease and Profit of Himself and of his People.

^c So in the Feudal Law, and by the Custom of *Normandy*, the Emperor, or Duke, had the supreme Dominion and Jurisdiction, as appertaining to their Royal Office; *Patriæ pacem tueri, æquitatis linea contentiones singulas terminare, & virgâ justitiæ populum coercere*. And this seems to have been the original Office of Kings, who were at first only Judges; and after Wars arose, became Generals and Leaders of Armies: and thus at length

^a Bract. lib. 3. cap. 9, 10. fol. 105, 108. Britton. fol. 1. Spelman's Gloss. tit. Cancellarius. Dugd. Orig. Juridic. cap. 6. Lambard's Archion. fol. 110, 111, 112, 277.

^b Mirror. cap. 4. sect. 2. 20 H. VII. fol. 4. 12 H. VII. fol. 17, 18.

2. Vent. 268. Woodward, v. Fox per Cur. Bacon on Government, cap. 71. fol. 301, 318. Corvini Digest. fol. 43.

^c Zouch. Descript. Jur. Temporal. par. 1. sect. 2, 8. Mackenzie's Instit. lib. 2. tit. 5. Bodin fol. 236. Crag. lib. 3. tit. 7. sect. 3, 4. & lib. 1. tit. 1. sect. 4, 5, 6.

length united both parts of Defence in them, in Peace and in War.

SECT. IV. *The King did never pronounce Judgment Himself, but by his Justices.*

YET^a it hath not been seen that any King of *England* hath pronounced Judgment with his own Mouth, neither can He at this day. But He hath committed all his judicial Power, some in one Court, and some in another, to his Justices; and by them he judges according to his Laws: *Et hæc est voluntas regis, viz. per justiciarios Et legem suam unum est dicere.*

^b But certainly, the Kings themselves often sate in Court in the King's-Bench: (nor let this seem strange to any one, since it is conformable to the Practice of Nations in many Ages.) And in the Rolls of Charters under King *John*, and the Times near him, often occur Grants; that such or such *English* should not be impleaded or put to answer, *nisi coram Nobis, vel Capitali Justitia nostrâ*; and to Normans, *nisi coram Nobis, vel Capitali Seneschallo nostro*. The one signifying the King's Person; although now Pleas entered in the *King's-Bench* before the Successor of the *Capitalis Justitia*, are entred *coram Rege*. And some Rolls, as of 44 *H. III.* have *Placita coram Domino Rege, de tempore Hugonis Bigod Justiciarii Angliæ*: And also in the same Bundle, *Placita coram Hu-*
gone

^a Fortescue, cap. 8. 8 *H. IV.* fol. 19. 8 *H. VI.* fol. 20. Fitzh. tit. Grant. 5. 2 *R. III.* fol. 11. *same cited* 4 *Inst.* 70, 71.

^b Selden's *Notes upon* Fortescue, cap. 8. 4 *Inst.* 73. Maddox's *Hist of the Exchequer*, cap. 3. Roll. Abr. fol. 535. Letter H.

gone le Bigod *Justiciario Angliæ*. And in 2 Ed. IV. the King sate in Person.

* So it is said that H. I. at leifure times, sate every day 'till Twelve a-Clock in his own House; *Secum habens Comites Barones, Proceres, & Vavasores*, to hear and determine Causes: whereby he attained the Sirname of *Leo Justiciæ* in all Stories; and so excelled, in peaceable Government of the State, his best Progenitors.

And it appears by the Plea-Rolls remaining in the Treasury of the Exchequer, that H. III. did several times sit personally in Judgment.

And the same is found of R. III. and H. VII.

* Cottoni Posth. fol. 48. Maddox fol. 68. Lambard's Archion. fol. 144, 165.



CHAP.



C H A P. II.

Of the PLACE *of* Judicature.S E C T. I. 1°. *Among the Saxons.*

WE must now proceed to the Place of Judicature. And first, among the *Saxons*; of the *Curia Regis*, or *King's-Court*, which some have doubted, whether at that time it had a Being or not; for that the *Saxons* were a plain and simple People, and did not affect Pomp and Ceremony, as the *Normans* that came after them.

Yet in the Laws of the *Saxon King Edgar*, it is thus ordained: "Let no Man seek to the King in Matter of Variance, unless he cannot find Right at home: but if that Right be too heavy for him, then let him seek to the King to have it lightened." The very like whereof, in effect, is to be seen in the Laws of *Canutus the Dane*, sometime King of this Realm.

From whence it is plain, that although the *Saxons* our Ancestors, who succeeded the *Britons* in this Country, retained the Manners of the old *Germans*, their own

^a Lambard's Archion. fol. 18, 19. Maddox Excheq. cap. 3. sect. 4, 6, 8.

^b Lambard's Archion. fol. 9, 19, 20. Brady Hist. book 2. part 1. fol. 74, 75. Spelman's Gloss. tit. Gemote, and its several Species, Folcmote, Hundredmote, Halmote, &c.

Elders, who, as *Tacitus* writeth, *Jura per pagos vicofque reddebant*, and made Distribution of Justice, not only in one Town, or in the Prince's Palace, but also at sundry other special Places within the Country, viz. in the Sheriff's-Turne, the Hundred-Court, and Court-Baron; which even to this Day do still remain the same in Substance, as they were then: Yet besides these base and inferior Jurisdictions, the King himself had an high Court of Justice, which did judge, not only according to meer Right of Law, but according to Equity and good Conscience.

Of the
Inferior
Courts.
The Hal-
mote.

^a As to the inferior Courts in the Country, the Theine or Lord of the Town had Jurisdiction over his Followers, the Caorls and Theodens, and with them did determine such Controversies as arose in his Territories. These the *Normans* called *Barons*; and out of this Usage the Court-Barons took their beginning. But the *Saxons* called it ^b *Sackam, Socham*; signifying thereby, *Causarum Actionem & Libertatem judicandi*. However, they had no Cognisance of criminal Matters, but by the King's Charter in the Leet or Tithing, which sometimes also was granted to peculiar Officers.

The Hun-
dredmote.

The Lord of the Hundred had Jurisdiction over all the Towns in the Hundred, as well in criminal Matters as in civil. And Appeals lay before him and his Followers, the Lords and Owners of Lands within that Hundred, who were bound to be present at every Court, which was held monthly, and especially at *Michaelmas* and *Lady-Day*. In like manner, the Trithing was the Court of three or more Hundreds.

The

^a Spelman's *Treatise of the Ancient Government*.

^b Keilw. 145. Bro. tit. Quo Warranto, pl. 2.

JURISDICTION *of the* CHANCERY.

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The Earl or Alderman was equal with the Bishop, and had the Government of the whole Shire, both in Civil and Criminal Matters, whether entered originally, or brought thither by Appeal. For this purpose he held his ordinary Court by the Sheriff, once every Month; where all the Free-holders were Judges. And as the Bishop had twice every Year two general Synods, wherein all the Clergy were tied to resort, for Matters concerning the Church: so there was twice a Year a general Assembly of all the Shire, for Affairs touching the Commonwealth; and these were composed of all Estates, both Clergy and Laity, and especially the Bishop of the Diocese. For at that time the Bishops and Temporal Lords did often sit in either Court together, as principal Judges. And the same ancient Institution remained after the Conquest, and was confirmed by LL. H. cap. 8. as appears at large from the Law itself.

* But there was in this respect a wide Difference between the *Saxon* and *Norman* Jurisdictions, that the former were not feudal, or arising from their Possessions, except of the Theine over his Followers, whose Lands were hereditary; and even there it proceeded rather from their precarious and incertain Estates, which made them subject to the Power of the Lord, than from any feudal League or Obligation. For all the Folckland was at will only, or for Life or Lives at farthest; but as to Tenures, they had not so much as the Name, though many Services, as the *Greeks* and *Romans*, and all other Nations.

*Of the
Difference
betwixt
the Saxon
and Nor-
man Ju-
risdiction.*

C 2

The

* Brady's Gloss. fol. 40, 41. and Hist. book 2. part 1. fol. 79. Spelman's *Treatise of Feuds*, cap. 1. and in Gloss. tit. Feudum, Comes, Justicia, & Aldermannus. Crag. de Feud. fol. 29. Bodin's *Commonwealth*, lib. 3. cap. 5.

The other Jurisdictions were at the pleasure of their Kings, as in *France* and *Germany*, while the Fees were at the Will of the Sovereign, or for Life at most; till *Hugh Capet*, usurping the Kingdom of *France*, to secure himself in the Throne, made them Hereditary. And then, whoever could dispose of Fees, might justly give Laws to their Vassals, erect Courts, and take upon them all other Privileges pertaining to a noble Fee. The Conqueror imitating the same Policy, did not only bring with him the Military Tenures, (which were hardly known here before, and arose from the particular Necessities of the Northern Nations, in their Settlements upon the Continent, of forming such Societies to protect themselves and guard their Conquests) but made them likewise Hereditary. From whence sprang those Incidents of Homage, Relief, Ward, Marriage, Esuage, Aid, &c. which are to be found perfectly described in the *Grand Coustemer*.

SECT. II. 2°. *Among the Normans.*

Of the
Curia Re-
gis.

WE^a will now take a View of the *Norman Courts*: and first, of the *Aula* or *Curia Regis*. The *Curia Regis* or King's Court hath a twofold Signification; 1°. as it is intended of the King's Palace, or 2°. of his chief and sovereign Court of ordinary Judicature. And in order to understand this latter aright, it will be ne-

^a Maddox's *Hist. of the Exchequer*, cap. 1, 2, 3. 4. *Inst. in the Proem.* Spelman's *Treatise of Parliaments*. Brady's *Gloss.* fol. 42. and *Introduction*, fol. 188, 189. Lambard's *Archion.* fol. 38, 39. Bacon's *Use of the Law*, fol. 17, 35. Dugd. *Orig. Juridic.* cap. 9. fol. 25. Bacon on *Government*, part 1. cap. 58, & 61.

necessary to take a View of the ancient State of the Kingdom.

The Realm of *England* was in old time deemed one great Seignory or Dominion, of which the King was Sovereign, or chief Lord, and his Court the See of the Sovereign Judicature.

This Power of judging was in a sort inseparable from the Royal Person; *ubicunque fuerit in Anglia in Curia vel in Itinere*: but more especially when he pleased to appear in the Splendour of a Sovereign.

The Barons were his Homagers, who held their Baronies of him, and were sworn to be his Men. They were called *Pares*, because they were Peers, and Con-vassals of his Court, *Barones Curiae Regis*. And from his often advising with them in Matters of difficulty, and doing many solemn Acts in their Presence, and with their Concurrence, *Conciliarii vel Concilium Regis*.

These being Peers of the King's Court, gave, as Occasion required, or they were commanded, their Attendance there (for Fidelity, Counsel, and Defence, were implied in their Oath of Fealty) and some of them more particularly, who were invested with the great Offices of the King's Courts; as the Justiciar, who presided there and in the Exchequer; the^a Constable; the Marshal; the Steward, or Seneschal; the great Chamberlain; the Chancellor; and the Treasurer: and were, together with some of the Bishops:

^a For the Court of the Constable and Marshal, see 4 Inst. 123. Spelman's Gloss. tit. Marschallus. Parker's Case 1. Lev. 230. 1 Syd. 352, 353. Cases in Parliament, 61, 62. And see his Office in Stat. 13 R. II.

This Office came with the Conqueror out of Normandy. Maddox's Hist. of the Exchequer, cap. 2. sect. 4, 5. Lambard's Archion, fol. 51.

Edward Duke of Buckingham, beheaded 12 H. VIII. was the last. Selden's Notes upon Fortescue, cap. 32. fol. 37, 38.

Bishops and Prelates, concerned in managing the Affairs of the Revenue, and in distributing publick Justice, in Causes brought into the King's Court. And the same Custom prevailed in other Countries, as the Empire, *France*, and *Normandy*, both in the holding the Court, the Attendance of the Barons, and celebrating the great Festivals.

But in Tract of Time, Suits growing more numerous, there were certain Persons, expert in the Laws and Customs of the Realm, assigned to sit with the King, or his Justiciar, as their Assistants: upon which, by little and little, such great Men, Barons, who had usually fate as Associates and Assistants, declined that Service. And this happened, as some have conjectured, about the same Time as the great Council of Lords was laid aside, and a Privy-Council first taken up.

*Of the
Courts-
Baron.*

In like manner, a Baron, or great Lord of the Realm, especially at the Capital Seat of his Honour or Barony, had his Court and Officers, his Steward, his Marshal, Chamberlain, and others: and in Affairs of weight, or common Concern, he consulted with his chief Officers, and other Peers, or Convassals of his Seignory, and did many solemn Acts of Donation, and Investiture, and of other kinds, in their Presence, and had ordinarily within his Fee, the Power of ministering Justice to his Vassals, or Men: all this in subordination to the King, and the *Curia Regis*. So that although there was this essential Difference between them, that the royal Seignory was held of no Superior, but Honours and Baronies immediately of the King: yet in sundry other respects they agreed. For the Oath was the same to the meanest Lord,

as

as to the King himself; and the Power of Jurisdiction extended even to the eighth part of a Knight's Fee, both here and in *Normandy*.

^a But the *Placita Spathæ sive Gladii*, were the peculiar Prerogative of the Prince: and no one could hold Plea of them, but by Grant or Commission from him; and so Jurisdiction was distinguished into *feodal* and *baillee*, as well in the Empire and *Normandy*, as here. For with us, a Leet, or Turne, is the King's Court of Record, and not incident to a Mannor, as a Court-Baron always is. Yet to an Honour, it seems by common Intendment, Franchises do belong; for it is held of the King in chief, and by reason of these Liberties and Franchises it is called an Honour, as *Scrope* said; as also, because it was originally the Name given to the ancient Feudal Baronies.

^b And as the *Curia Regis* was instituted in case of the King, so were afterwards the Justices in Eyre in case of the *Curia Regis*; the Writ of false Judgment proving an ineffectual Remedy, and the Number of Suits encreasing. But the particular Time when they began, is not very certain; and they who would infer from *Hoveden*, that they were first instituted in the Reign of *H. II.* may fall into

*Of the
Justices
in Eyre,
&c.*

^a Zouch. Descript. Jur. temporal. pars 1. sect. 3. pars 3. sect. 2, 3. Crag. de Feud. lib. 3. tit. 7. Struv. Syntag. fol. 109, 196, 208. 12 H. VII. 17, 18. 4 Inst. cap. 53 to 58, 59. 2 Inst. 70, 99. 4 Co. 33. 6 Co. 11. *The Common Law gives Him a Court of his Tenants, but Foucher, Pillory, Infangthefe and Tumrill, can't be by reason of a Mannor ruled.* Keilw. 138. a. *But the King is the Original of all Franchises, and regularly they do not pass out of Him without express Words.* Keilw. 151, 138, 139, ruled. Spelman's Gloss. tit. Honor.

^b Maddox's Hist. of the Exchequer, cap. 3. sect. 10. Spelman's Gloss. tit. Iter. Lambard's Archion. fol. 36, 37. Bacon's Use of the Law, fol. 17, 18, &c. 4 Inst. cap. 33. Justices of Peace, cap. 31. Justices of Goal-Delivery, cap. 30. Justices of Oyer and Terminer, cap. 28. Justices of Assize, and Nisi Prius, cap. 27.

into an Error. These Justices itinerant were usually the same Persons, amongst others, as sate in the *Curia Regis*, and the Pleas and Business before them much alike in both Places. You may see a Catalogue of them in *Maddox*, and the Articles in Eyre in *Hoveden*. Their Authority is since translated by Act of Parliament to Justices of Assize, who are now the Judges of the Circuits; and they have five Commissions by which they sit, 1°. of Oyer and Terminer; 2°. of Goal-Delivery; 3°. of Assize; 4°. of *Nisi Prius*; 5°. of the Peace.

SECT. III. *Of the Pleas, and Business in them.*

THE ^a Pleas that were cognizable in this Court, were of two sorts. The first belonging to it properly and immediately; the other *mediante Comitatu*, when the Lord's Court failed of doing Right, being removed thither by *Pone*, upon good cause.

Of the first sort were the *Crimina Majora*, that concerned Life or Members, and civil Pleas concerning Baronies which were held of the King *in Capite*; and some others, more of necessity than of right, as Pleas of Adowsons and Dower, because no one but the King could write to the Bishop to admit the Clerk, or certify the Legitimacy of the Marriage. Also Fines taken in this Court; because no one else could interpret them but the Court where they were permitted.

As

^a *Maddox's Hist. of the Exchequer*, cap. 3. sect. 6. *Selden's Notes upon Hengham*. fol. 135, 136. *Glanv. lib. 1. cap. 3. lib. 12. cap. 1, 2, 7, 8. Bract. lib. 3. cap. 7. fol. 105, 106, 154. Crag. de Feud. lib. 3. tit. 7. sect. 2.*

As to the second sort, it is to be known, that no one can be impleaded concerning his Freehold, without Writ of the King, or his Justice; and this must be directed to the Lord only of whom he claims to hold it: nor can it be transferred to the County without cause. The reason of this was, 1^o. because in ancient Times all Conveyances were made before the Tenants of the Lord's Court, and registred in the Court-Rolls, as of Copyholds now: wherefore the Trial was to be *per Pares Curie*, or by the Court-Rolls. 2^o. The Lord would else lose all the Profits of his Court. But where the Necessity of the Case requires it, or lest there should be a Failure of Right: it may be carried into the County Court, or from thence to the King's Court.

* This Gradation of carrying the Suit from the Lord's Court to the County, and from thence to the King's Court, appears from the Words of the Writ of Right itself, & *nisi feceris Vicecomes faciat, ne amplius Clamorem inde audiamus pro Defectu Recti*. For it is a Rule in Law, that all Proceedings ought to be *per Gradus*, and not *per Saltum*.

* But as where the Land lay in several Mannors, the Suit was to be brought in the Court of the Hundred; and so, if in several Hundreds, in the County Court: after the same manner, where it was in divers Counties, the Suit in the first Instance might be brought in the King's Court. And in all these Matters there was a great

^a Spelman's Gloss. tit. Comes. Fleta lib. 6. cap. 3. de Defect. Cur. Dominor. 1 Lev. 23. agreed per Cur. in Dr. Widdrington's Case.

^b Brady's Pref. to the Norman Hist. Bacon on Government, part 1. cap. 48. fol. 133. Zouch. Descript. Judic. temporal. pars 3. sect. 2, 3.

Affinity betwixt our Common Law, and the Customs of *Normandy* and *Milan*.

^a And how extensive soever this feodal Jurisdiction was in old Time, it is now restrained to hold Plea of Freehold without Writ, or ^b above the Value of 40 s. Yet the Sheriff, by a *Justicies*, has still a Commission to hold Plea of any Sum. Also the Pleas of the Crown are taken away from the County and Hundred, *viz.* in the Turne and Leet, by *Magna Charta*, cap. 17. and the Charters of *Infangthefe* and *Outfangthefe* are grown obsolete in the Courts of the Mannors, to avoid the Mischiefs that arose from the frequent Errors of the Stewards.

^c But besides the Pleas cognizable in this Court, we also find in *Bracton*, the King's-Bench armed with a Power of correcting the Wrongs and Injuries of all other Courts; and it retains at this day a Superintendency of all Jurisdictions, spiritual and temporal, to keep them within their Bounds; ^d and so may it still correct other Errors extra-judicial, tending to the Breach of the Peace, Oppression of the Subjects, or any other manner of Misgovernment. For it is truly said, that the Justices of the King's-Bench have supreme Authority; the King Himself sitting there, as the Law intends.

With

^a Mirror. cap. 1. sect. 3. 2 Inst. 312. sur Stat. Gloc. cap. 8. Spelman's Gloss. tit. Infangthefe.

^b 19 H. VI. 8. 14 H. VIII. 15. 6.

^c Bract. lib. 3. cap. 7. fol. 106. 1. Lev. 23. *Dr. Widdrington's Case* in Mandamus, which were then said to be rare, till within these ten Years. Styles 457. *the Protector*, v. Crawford. Cro. Jac. 345. *Penson*, v. Cartwright in *Prohibition*. 38 H. VI. 14. 19 H. VI. 54. Error. 14 H. VII. 14. 21 Ed. IV. 81, 82.

^d 4 Inst. 71, 73. 11 Co. 98. *resolved in James Bagg's Case*. 9 Co. 118, 119. in *Lord Sanchar's Cases*. 34 Aff. 7. ruled. 27 Aff. 22.

* With this agrees *Fleta*, which says, that there is mention made of the Power of the *Capitalis Justic' Regis* in the common Writ *de Homine replegiando*, who used to determine the proper Causes of the King, correct false Judgments, and exhibit Justice to Plaintiffs without Writ.

There were also other Businesses transacted in this Court in ancient Times, such as Feoffments, Releases, and Conventions of divers kinds, as you may see at large in *Maddox*.

SECT. IV. *Of their Manner of proceeding.*

NOW ^b although the King's Court was open to all, yet he who sued for Relief in it usually paid a Fine or Fines, to have *Justitiam* or *Rectum* in his Court. And thereupon he obtained a Writ under the King's Seal from the Chancellor, who had the keeping of it; from whence came the Phrase of purchasing a Writ. And thus it came to pass in process of Time, that in Law-Proceedings, the King's Chancery was the Spring or first Mover; and the principal or original Writs were called Writs of the Chancery.

And this was also found necessary in those Ages when Men dealt very much in Power; and then the King was the great Asylum to protect the Weak against the Mighty: so that it was not a light Privilege to have one's Cause determined in the *Curia Regis*; and that Privilege was usually and most properly annexed to important Causes.

* *Fleta* lib. 2. cap. 2. *Maddox's Hist. of the Exchequer*, cap. 3. sect. 7.

^b *Maddox's Hist. of the Exchequer*, cap. 3. fol. 59, &c. sect. 4, 6, 8.

And, seems to have been, it was generally granted either to Persons of high Rank, or to such as wanted effectual Protection against some powerful Oppressor.

* The Form of proceeding in the *Saxon* Times, Mr. *Selden* declares that he was never able to find; which seems to confirm the received Opinion, that it was in a very plain and simple manner; or else it is hardly possible that there should be no Remains of it in some of the Abbey Books. However, you may see an Example in *Brady*, of the Method made use of in old *Germany*, which was probably the same, or very near it. There it appears to have been by Summons, without Writ; for Writs^b, in that sense, are not known in the feudal Law. But in *France*, it is said, the Use of them is very ancient, and *William* the Conqueror brought them with the *Norman* Laws into *England*, and from hence they were transmitted into *Scotland*, and not with the feudal Customs, as some have imagined. Yet even in the *Norman* Times we find a great Plainness and Simplicity in their Proceedings in their Courts; which continued till the Introduction of the Canon and Civil Law by the Clergy, while they presided there, betwixt the Reigns of *Stephen* and *Edward III.* See the Form of *John Bishop* of *Bath*'s holding his Court within his Barony, and the proceeding in it at large in *Maddox*.

CHAP.

* *Brady's Pref. to the Norman Hist. and General Pref.* *Selden's Fleta*, & *Eadmer*. fol. 6. *Dugd. Origin. Juridic.* cap. 16. *Hicetii Dissertat. Epistolar.* *Crag. de Feud. lib. 2. tit. 17.* fol. 478. *Bacon on Government*, part 1. cap. 36. fol. 85, 86.

^b *Selden's Notes upon Hengham*, fol. 122.



C H A P. III.

*Of the Justitia, or Chief-Justice of England.*S E C T. I. *His Origine.*

WE shall pass over the rest of the great Officers who sat in the *Curia Regis* as afore mentioned, excepting only the *Justitia*, and the Chancellor; it being foreign to our purpose to treat of them at this time: and we will first speak of the *Justitia* who presided there, and in the Exchequer.

* The Title of *Justitia*, by which he was called in the most ancient Times, was at least, if not the Office, brought hither out of *Normandy* by *Edward* the Confessor, or rather by *William I.* For by the Custom of *Normandy*, a Judge is stiled *Justitia*, or *Justitarius* (à *Justitia*) from Justice itself. Afterwards he was sometimes stiled *Justitarius Regis Angliæ*, the King's *Justiciar*, *Justiciar of England*, probably to distinguish him from the King's *Justiciar of Ireland, Normandy, &c.* For which reason also, it is likely, other Officers of State were called *Constabularius Angliæ*, *Cancellarius Angliæ*, *Tresaurarius Angliæ*, &c.

The

* Spelman's Gloss. tit. Aldermannus. Zouch. Descript. Judic. temporal. pars 3. sect. 1, 2. Maddox's Hist. of the Exchequer, cap. 2.

^a The Power and Authority of this *Justitia*, or Chief-Justice of *England*, seems most probably to have arose from the Ruins of the *Major Domus* amongst the *French*, and to have collected in it all the scattered Functions of that great Officer. But in order to take off the Odiousness of that Name, he was by some called *Comes*, or Companion, Rector, or Ruler, and *Princeps Palatii*, Governor of the Palace; by others, supreme and chief Justice; by a third sort, Steward and *Dapifer*, not regarding precisely the differences of these Words. And in *Normandy* it is thought there never was any other Chief-Justice than the High Steward or Seneschal of *Normandy*, from whom the Chief-Justice here differed rather in Name than in Office. Nor is it easy to divine what the *Aldermannus totius Angliæ* should be, of whom mention is made among the *Saxons*, unless he were the same with him who was afterwards stiled Chief-Justice of *England*.

SECT. II. His Office.

THE ^b full Extent of the Office of Chief-Justice of *England* scarcely appears. He surpassed all the Nobles in Dignity, and in Power all the Magistrates: presiding first in the Kingdom, next after the King. Certain it is, that he at one time executed by himself, the Offices of four of the principal modern Judges, *viz.* of the Chief-Justice of the King's-Bench, the Chief Justice

^a Spelman's Gloss. tit. Justitarius, & Comes Palatinus. Brady's Pref. to the *Norman Hist.* fol. 153. Dugd. Orig. Juridic. cap. 7, & 9. Bodin. Repub. lib. 3. cap. 6. fol. 343. Selden's *Tit. of Honour*, part 2. cap. 5.

^b Spelman's Gloss. tit. Justitarius. Bacon on *Government*, cap. 58, 60. Maddox's *Hist. of the Exchequer*, cap. 2. sect. 2, 6, 7.

Justice of the Common-Pleas, the Chief-Baron of the Exchequer, and the Master of the Court of Wards. And while he presided in the Exchequer, he had the Treasurer under Him; and the sole Government and Disposal of the publick Treasure by his Writ. Also the Forests were in many things subject to the Exchequer, and consequently to the Chief-Justice of *England*. And so high was his Power, that He issued out his Writs tested after a Royal manner, and by the Prerogative of his Office in the King's absence ruled in his stead: and was called the King's Vicar, Lieutenant, Viceroy, Keeper and Guardian of the Kingdom. But in what he differed from the High Steward of *England*, since both had much the same Jurisdiction, is hard to determine. (The particular Instances of the Nature of his Office, and what Powers he exercised in former times, you may read at large in *Maddox*. And this the High Steward had peculiar to him, with the Constable and Marshal, that their Offices were in those days hereditary.

S E C T. III. *Of the Division of the Common-Pleas from the Curia Regis.*

IT * is not an easy matter to fix the Time precisely, but the Division of the King's Courts was perhaps begun in the Reign of *Richard I.* or King *John*, and completed in the Reign of *Henry III.* For in the ninth year of *H. III.* or rather in the 17th of King *John*, the King granted, at the request of the Nobles, that Common
Pleas

* *Maddox's History of the Exchequer.* Spelman's Gloss. tit. Justiciarius. Lambard's Archion. fol. 42. Bacon on Government, part 1. cap. 60, 67.

Pleas should not follow the King's Court, but should be held in a Place certain, as they accordingly have been ever since at *Westminster*. The Place therefore being now fixed, the Judges were also to be accounted fixed; and as with them the Chief-Justice of *England* could not stay, for that by virtue of his Office he was to follow the King's Court wherever it went; he was first of all obliged to part with this Province, and to give up the Execution of it to some other Person, who thereupon was appointed Chief-Justice of the Common-Pleas. After this manner the Chief-Justice of *England* lost a Part of his Office, not only great and noble, but very profitable.

^a But this Statute does not extend to any Action *Quare vi & armis*, where the King is to have a Fine; nor does it take away the Privilege of any Court, so that where a Man is *in Custodiâ Mareſcalli* at the Suit of one, any other may have a personal Action by Bill against him.

S E C T. IV. *Of the Division of the Exchequer from the Curia Regis.*

BUT ^b the Chief-Justice still presided in the Exchequer; and till the Erection of the Court of Wards, 33 *H. VIII.* the same Matters were transacted in the Exchequer. But this too he lost, as some guess, in the time of *Edward H.* a new Magistrate being introduced in his stead, who was called Chief-Baron of the Exchequer. This

^a 2 Inst. sur Magna Charta, cap. 11. Cowel's *Interpreter*, tit. *Lattat*.

^b Spelman's Gloss. tit. *Justiciarius*.

* This Chief-Baron was anciently one of the Prime of the Nobility ; and the rest of the Barons of the Exchequer were *Barones Majores*, or Lords of Parliament, as appears from *Bracton*. And the Term *Barons*, the *French* used for any Judges or Magistrates ; which seems to have been the Reason why the other Judges were not called *Barons*, because it was this Court of Exchequer only that was brought hither out of *Normandy*.

† For this Court the Conqueror did erect, after the Name of his Exchequer in *Normandy*, though in the Manner thereof it differed not a little from it. For the Exchequer of *Normandy* had not only the Government of the Revenues of the Duke, but was also the sovereign Court for Administration of Justice amongst his Subjects ; and so continued until *Lewis XII.* King of *France*, *Anno Dom.* 1499, converted it into a Court of Parliament, consisting of President and Counsellors, and established it at *Roan* in *Normandy*, where it now remaineth. But this his Exchequer in *England* had only the Direction of his Demesnes and Receipts : the Administration of common Justice continuing still in that other high Court of his, as it was before his coming hither.

• But Mr. *Maddox*, in his History of the Exchequer, seems to disagree almost in every Article with this Account of it. For he there undertakes to prove at large, 1°. That the bringing in as well the *Curia Regis*, as the

* Spelman's Gloss. tit. *Barones Scaccarii*. Lambard's Archion. fol. 29, &c. 4 Inst. 103. Camd. Brit. fol. 142. Spelman of Terms, cap. 12. Somner's Gloss. ad decem Scriptores. Hicetii Dissertat. Epist. fol. 48. Stillingfleet's Eccl. Cas. fol. 2. p. 34, 35.

† Lambard's Archion. fol. 31, 32.

• Maddox's Hist. of the Exchequer, cap. 5, & 6. sect. 4. and cap. 4. sect. 4, 5. and cap. 3, & 6.

Exchequer, was a part of that Alteration which the *Normans* made here in the Law, by the introducing their own Customs, as they did also in *Naples* and *Sicily*; although the whole perhaps was not compleated, by reason of the unsettled State of Affairs, till the Reign of *H. II.* 2°. That both in *England* and *Normandy*, and, as one may suppose, in other Countries where the feudal Laws and Usages did obtain, the Exchequer was a Subaltern Court, though annexed to the *Curia Regis*, and resembling its Model. And in confirmation of this, he says, that there are three large Membranes of a *Norman* great Roll^a, extant in the *Tower*, so like in Character, Method, and Manner of Entry, to the *English* great Rolls, or Pipe-Rolls, that they are hardly to be distinguished from one another. 3°. That yet it had a Share of the Pleas brought into the King's Court; though how they were divided between them, he could not determine. And indeed it is highly probable, whatever the *Curia Regis* was in the *Saxon* Times, that the *Normans* did introduce a new Form of their own; and the Exchequer, though in the general Signification it comprehended also the King's Court, yet strictly and properly, that part of it which dealt with the Revenue, might be distinguished from the other. But as to the third Point, it is now settled in our Law, that the Exchequer here has no original Jurisdiction of Common Pleas, but is a Court only for the Profit of the King, viz. touching his Revenues, Debts, and Duties. And so in *Scotland*, the Exchequer

^a Plowd. 208, 209. *Stradling, v. Morgan held contra Saunders Chief-Baron.* Mackenzie's Instit. book 1. tit. 1. *Verh. Case 219. Earl of Newburgh, v. Wren.*

chequer is the King's Chamberlain's Court, where he judges what concerns his own Revenues. But for the Benefit of the King, in the Dispatch of the Business of the Court, the Officers and Ministers of the Court shall sue there; and so shall one who is indebted to the King by surmise of *Quo minus*, &c. partaking of his Prerogative: and so it was ruled by *Skip. 38. Aff. 20.* For of every thing, says he, that touches the King, and may turn to his Advantage to hasten his Business, we will take cognisance.

SECT. V. *Of the Institution of a new and lower Order of Chief-Justices, which still continues.*

THE King often used to join with the Chief-Justice, in the Office of a Viceroy or Guardian of the Realm, other Nobles, who were also called Justices of the Kingdom. And R. I. divided the Chief-Justiceship in another manner, into two Magistracies, distinguished into separate Jurisdictions, viz. North, and South, as appears in the Catalogue of Justices. But they were soon united again. And their Power fluctuating till the decease of H. III. they were reduced into a lower Class^b, by Ed. I. For the King observed how powerful this Magistrate was^c, in stirring up and cherishing Uneasinesses in the Kingdom, and how troublesome to his Father and Grandfather; he thought it adviseable therefore to pull

^a Spelman's Gloss. tit. Justiciarius.

^b Philip Basset, made 45 H. III. was the last. Dugd. Orig. Juridic. cap. 7. Same. 4 Inst. 73. Spelman's Gloss. fol. 415.

^c King John was so afraid of Gaufrid, the Son of Peter his Justiciar, that he swore when he heard of his death, that he was never before that time King of England. Matt. Par. Anno 1213.

down their Loftiness, as well in their personal Dignity, as in the Extent of their Office. And thus the great Men of the Kingdom, having been often passed by in the Confusion of the Times, he began a new Order or Chief-Justices, chosen out of the inferior Nobility. An Order not popular, nor stubborn, nor puffed up with great Alliances, or with a numerous Train of Followers: but cautious, well instructed in the Knowledge of themselves, and much more famous for their Skill in the Laws. For now from this time forwards the Science of the Law grew to a more exalted Perfection. Nor was it any longer to be acquired at leisure Hours, by such as followed different Studies, as the Nobles, the Art of War; the Clergy, Divinity: but required all the Powers of the whole Man, throughout his whole Life. He restrained his Power also within straiter Limits. So that now being removed from the Helm of Affairs, and from the Extent of his ancient Greatness, he was confined altogether to the Business of the Courts, and in giving Judgments, having the Title of Chief-Justice of the Pleas to be held before the King, or, according to others, Chief-Justice of the Upper Bench. For which, see the * Writ by which he is constituted, as it, in all probability, retains its ancient Form. *Rex, &c. E. C. Militi Salutem; Sciatis quod constituimus vos Justiciarium nostrum Capitem ad Placita coram nobis tenenda, durante bene placito, nostro Teste, &c.* Which Writ being called *Breve*, doth in few words comprehend the Substance of the former Letters-Patents; and these Alterations were made by Authority of Parliament, though not now extant. For it is a Rule in Law, that ancient Offices must be granted in such Forms, and in such

* Inst. 80, 81.

such Manner, as they have used to be, unless the Alterations were by Authority of Parliament.

The rest of the Judges *B. R.* have their Offices by Letters-Patents, which see there; and where, in 5 *Ed. IV.* 137. it is holden by all the Justices *Cam. Scacc.* that a Man can't be Justice by Writ, but by Patent, or Commission, it is to be understood of all the Judges, except the Chief-Justice of this Court: but both the Chief-Justice, and the rest of the Judges, may be discharged by Writ under the Great Seal.

* Some therefore will not allow this great Magistrate to be now called Chief-Justice of *England*. And the Lord Coke was threatned in the Reign of King *James*, for giving himself this Title, in the Frontispiece to his 10 and 11 Reports; but he followed the vulgar manner of speaking, and not altogether without Reason. For the Chief-Justice still retains all *England* under his Jurisdiction, as to the preserving the Peace, and Dignity of the Crown. Also sending his Warrants to the extremest Parts of the Realm, he prefixed the Title *England* in the Margin, as a Mark of his Authority. Divers Parliaments therefore have not disdained to call and own him, even in our Times, spoiled (as he is) of his ancient Greatness, Chief-Justice of *England*; as you may see in the Stat. 34 *H. VIII. cap. 26.* 37 *H. VIII. cap. 12.* and in the Decree upon that Statute, 2 *Ed. VI. cap. 13.* and 18 *Eliz. cap. 12.* and in a private Statute, 23 *Eliz. cap. 5.* cited in the new Book of Entries; *tit. Action* upon the Case, Stat. 5, &c.

SECT.

* Spelman's Gloss. tit. *Justiciarius*.

SECT. VI. *The Justices anciently chosen out of the Clergy.*

THE ^a Justices, and all the rest of those that followed the Courts, were anciently chose out of the Clergy for the most part. The Laity then being more fond of War than Learning, and this as well among the *French* and *Normans*, as the *English* and other Nations: as you may see of the *Normans*, in the old Customary, cap. 9. and among the *English* the same Custom prevailed, without doubt, as with the *Normans*. And *Matth. Paris* (*Brady* says, *Malmsbury*) shews this *Norman* Custom to have remained among the *English* in *William* the Second's Time; saying, that there was not a Clergyman but what was a Lawyer. Yet one cannot but admire their Breach of the Canons^b, which so strongly prohibit Ecclesiasticks from secular Offices. It is certain, that when *Hubert Walter*, Archbishop of *Canterbury*, was made Justiciary^c of *England* by *Richard I.* Pope *Innocent* enjoined the King, under the Peril of an Interdiction, that he would remove the Archbishop from the Office of Justiciary; more especially (says he) since it is not lawful for Bishops to embarrass themselves with secular Affairs. *Matth. Paris* in *Anno* 1198. The King immediately obeyed,

^a *Spelman's Gloss. tit. Justit. Selden's Dissertat. ad Fletam. Brady's Pref. to the Norman History, fol. 154. and in his gen. Pref. fol. 4. 2 Inst. 98. 1 Inst. 304. See the Reason given, Dugd. Origines Juridic. cap. 7. and so it was in the Saxon Times, cap. 8.*

^b *When the Bishops began to be meer Judges of secular Courts, then were they prohibited by many Canons. Spelman Rem. fol. 116. Answer to an Apology for Archbishop Abbot.*

^c *See Maddox's History of the Exchequer, fol. 25.*

obeyed, making *Gaufred* the Son of *Peter*, Justiciary. Nor did any more of the Clergy ever after attain this Dignity; except the Bishop of *Winchester* under King *John*, and *Hugh de Pateshul*, Clerk, in the Reign of *H. III.* (and *John Mansel*.)

But the Ecclesiasticks continued in the other Offices of Justice, Officials, and Ministers to the Time of *Edward I.* But when they daily offended more grievously, in the Administration of Affairs, nor was the King able easily to punish the Delinquents, by reason of the Privilege of their Order; being mindful of the Canons, he took care to remove them by degrees (as the King of *France* did also) and to bring Laymen in their room, whom he could restrain more freely. For being accused of any Crime, they took Refuge^a in their Clergy: although they had before renounced it, or till then concealed it, covered over with a secular Covering, as the Custom at that Time was. Hence the *Linea Caliptra* (which they call a Coif, and the Serjeants at Law make use of at this day) was first, as is thought, introduced to hide the clerical Tonsure: of which see *Spelm. Gloss.* under the Title *Coisa*, and *Matth. Paris* in Anno 1234.

PART

^a See *Dr. Horsey's Case*, Keilw. 181, &c. *Lancelott's Institut.* lib. 3. fol. 171. *The Case of the King, v. Devyer.* *Cases in Equity*, fol. 271, &c. And during the Time of Popery, the Bishops contended that they were to be tried only by their Ordinary; so that, after the Reformation, there being no Instance where they had been tried per Pares in Parliaments, they were tried by common Juries. *Stillingsbee's Bishop's Jurisdiction*, 367, 368.



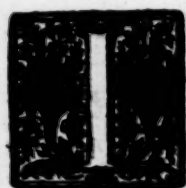
P A R T II.

*Of the Original Jurisdiction of the
Chancellor, and Court of Chan-
cery.*

C H A P. I.

Of the Chancellor.

S E C T. I.



T remains that we treat of the Chancellor and Court of Chancery. The ^a Office and Jurisdiction of the Chancellor is manifold; for usually he is a great Personage, a Counsellor of Estate, and Prolocutor of the higher House of Parliament. He is also Keeper of the Great

^a Lambard's Archion. fol. 56, 59. Camd. Brit. 143.

Great-Seal of the King. And hath moreover a two-fold Jurisdiction, the one of Common Law, the other of Equity; the first being limited in Power, but the latter more absolute and infinite.

Now for the better understanding the beginning of them both, we will examine the Matter by parts. And first, for his original Duty.

SECT. II. *Whence he came, and his Original Duty.*

IT cannot be credibly shewn out of any History, as some ^{1°. Making and sealing the King's Writings.} think, that ever there was in *England* any Sealing of Writings, or Mention of the Name of Chancellor, before the days of *Edward* the Confessor; who having spent a great part of his Time in *Normandy*, first brought the Use of the Seal from thence into this Realm, and with it (as is supposed) the Name of Chancellor also, whose Office then was at the first to make and seal the King's Writings.

Yet by the word Writings, it is not meant that he had the Authority of making original Writs here, before the Time of the Conquest: for those came out of *Normandy* too, as the very Forms of most of them, being expressed in the Book of the *Norman* Customs, may lead a Man to think; and the rather, because the *Saxons* our Ancestors, whose proceeding in Judgment was *de Plano*, and without Solemnity, did not use (so far as has been yet observed) to call the Parties by any Writ or Writing, but to send for them by certain Messengers, which they termed *Theines*, that is to say, Ministers or Servants.

^a Lambard's Archion. fol. 61, 62. Dugd. Origin. Judic. cap. 16.

And so in the *Norman* Customs, it seems that they sent Serjeants, without original Writs or Mandates in writing. And even after that manner of summoning by Writ was brought into use and custom here, yet was not the sealing of the Writs immediately committed to the Chancellor. For you may see in *Glarvil's* Book, that the original Writs of his time had this Form; *Teste Ranulpho de Glarvilla*, &c. which was the Name of the Chief-Justice of the King's Courts, under whose Seal they passed abroad.

S E C T. III.

2^o. Keeping the Rolls of Record.

IT^a must be confessed, however, that the Chancellor had the keeping of the Rolls of Record, and the making out of original Writs, either at the same time that the Common-Pleas was erected, or not long after it: that is to say, either under the Reign of *H. III.* or else in the Reign of *Ed. I.* who, as ^b Judge *Prifot* reporteth of him, laboured carefully to reduce our Law into Order and Writing; and, as all agree, may therefore not unworthily be accounted our *English Justinian*. And although the House of the Rolls, which has been of long time, as it were, the College of the Chancery-Men, was built at the first by the same King *Henry III.* for another Purpose, viz. for the Sustentation of such *Jews* as would give their Names to Christ, and was therefore called ^c *Domus Judæorum*: yet that hinders

^a Lambard's Archion. fol. 67, 68.

^b 35 H. VI. fol. 42. a. Selden proves this to be meant of the Treatise called Briton. 35 H. VI. Fitzh. tit. Gard. 59. Selden's Dissertat. ad Fletam, cap. 2.

^c Spelman's Gloss.

hinders not, but that the same House might shortly after be converted to another Use, upon Experience, as it is likely, that few Converts were found amongst the Jews to inhabit it.

And thus you have the Chancellor furnished with the Seal of Grace, and the Seal of common Justice; and with him the Chancery for keeping of Records, and the Clerks for the framing of Writs.

And such was the Court of Chancery at the time when *Fleta* wrote, as appears from his Description of it. " There is, says he^a, amongst the rest, a certain Office " called the Chancery, which ought to be committed to " a prudent and discreet Person, as a Bishop, or other " Clergyman of great Dignity, together with the Care " of the great Seal of the Kingdom; whose Substitutes " are all the Chancellors in *England, Ireland, Wales,* " and *Scotland*, and all who have Custody of the King's " Seals every where, except the Keeper of the Privy- " Seal. To whom are associated Clergymen, honest " and circumspect, sworn to our Lord the King, who " have a more ample Knowledge in the Laws and Cus- " toms of *England*. And to their Office it belongs to " hear and examine the Petitions and Complaints of " Plaintiffs, and to give them a Remedy suitable to the Qua- " lities of the Injuries shewn by them." And ^banother, at the same time saith thus, " The Chancellor, as in the " Court, so at the Exchequer, is of great Authority; so " that without his Assent or Counsel, nothing of mo- " ment may or ought to be done. But this is his Office

^a *Fleta*. cap. 13.

^b *Dial. de Scacc.*

“ while he sits at the Exchequer; to him belongs the
 “ keeping of the King’s Seal, which is in the Treasury:
 “ but it does not go from thence, unless when with the
 “ Precept of the Justiciar, (*i. e.* the Grand Justiciar of Eng-
 “ land) it is carried from the lower to the upper Exche-
 “ quer, by the Treasurer or Chamberlain only, to do
 “ the Business of the Exchequer; which being over, it
 “ is put into a Purse, and the Purse sealed by the Chan-
 “ cellor, and so delivered to the Treasurer, to be kept
 “ by him.

“ Also when there is Occasion, it is presented sealed to
 “ the Chancellor in the Eyes of all, never to be presented
 “ by him or any other, in any other manner. Also to
 “ him belongs the Custody of the Roll, which is of the
 “ Chancery, by a Person put under him.”

* But although the King’s Chancellor is frequently named
 in the Histories of the Kingdom, the ancient Historians
 say little concerning his Duty, or the Nature of his Of-
 fice. A few Memoirs may be here added: He was wont
 to supervise the Charters which were to be sealed with the
 King’s great Seal; he used likewise to supervise and seal
 the Writs and Precepts that issued in Proceedings pend-
 ing in the *Curia Regis*, and in the Exchequer. And af-
 ter the Division in the King’s other Courts of Law, he
 was one of the King’s prime Counsellors in Affairs of
 State, and did Acts of divers kinds in the Palace, as well
 in judicial Proceedings as otherwise. In ancient Times
 he was also wont to act together with the Chief Justiciar,
 and

* Maddox’s *History of the Exchequer*, cap. 2. sect. 9. Hickeſſiſ Episto-
 48. *Of the Difference between the Chancellor and Referendarius (in France)*,
 ſee Mabillon de Re diplom. lib. 2. cap. 11, &c.

and other great Men, in Matters of Revenue at the Exchequer; and sometimes with the other Justiciars Itinerant in their Circuits. And thus the Chancery, from a small beginning^a, became in process of time, an Office of great Dignity and Preeminence. When the Number of Royal Charters began to multiply; when the Pleas and Causes in the King's Courts grew numerous; and when the Grandeur of the High Justiciar came to decline, the Power of the Chancellor waxed, as it seems, greater than it had formerly been. And, it is generally imagined, the Chancellor's Office received a considerable Accession of Power and Dignity, from the Greatness of some of the Persons who had borne it. And it seems, the Chancellors of other Countries acquired by degrees, the like Additions of Greatness and Preeminence.

S E C T. IV.

AS^b for the Authority of the Chancellor in Judgment; it appears not what Jurisdiction he has (his Court of Equity, and some Powers given by late Statutes, only excepted) which is not incident to the making or keeping of Records. For he hath Power^c to hold Plea of *Scire fac.* for Repeal of the King's Letters Patents, of Petitions, *Monstrans de Droits*, Traverses, Partitions in Chancery, of *Scire fac.* upon Recognizances in this Court, Writs of *Audita Querela*, and *Scire fac.* in the nature of an *Audita Querela*, to avoid Execution in this

^a Paul. Æmyl. de rebus gestis Francor. p. 104. a.

^b Lambard's Archion, fol. 68, to 70.

^c 4 Inst. 79, 80. Lambard's Archion, 58.

this Court; Dowments in Chancery; the Writ *de Dote assignanda* upon Offices found Execution upon the Statute Staple, or Recognizance in nature of a Statute Staple upon the Act of 23 H. VIII. (but the Execution upon a Statute Merchant, is returnable either into the King's-Bench, or into the Common-Pleas;) and all personal Actions by or against any Officer or Minister of this Court, in respect of their Service or Attendance there.

^a But he cannot forgive the Error of another Court; and even Error committed in his own Court, shall be reversed in the^b Parliament. Neither can he try any Issue taken before him; for that also must be done in the King's-Bench. And that moved *Scroope*, Chief-Justice of the King's-Bench, ^c*Mich. 1 Ed. III.* in a written Report, to say, that the Chancery, and the King's-Bench, were but one Place, *viz.* the Bench of the King; and that the Chancellor may by his hand, without Writ, deliver any thing to be tried in the Bench of the King.

^d And what is done by the hand of the proper Officer of the Chancellor, may be well enough said to be done by Him. And though the Clerk of the Petty-Bag, carrying the Record without an Order, has committed a Fault to this Court, yet that will not prevent the Record from being well removed.

But

^a Lambard's Archion, fol. 68, to 70.

^b And not in B. R. even on the Latin Side. *The King, v. Cary* 1. Vern. Case 116. ruled. Crompton. 11. b. 37 H. VI. 15 contra. 4 Inst. 80. Dyer 315.

^c 10 Ed. III. 59, 60. cited 2 Inst. 554. 4 Inst. 80. Same per Schard.

^d M. 1700. between the King and the Warden of the Fleet, ruled by the Lord-Keeper clearly. *Abr. Cases in Equity*, fol. 128, 129.

^a But after Tryal had, it is to be remanded into Chancery, and there Judgment to be given. And if there be a Demurrer in Law, it shall be argued and adjudged in this Court. And so it seems in all Cases, if the Issue is not to be tried by a Jury, as by the Bishop's Certificate, or the like.

Yet the Chancery may adjourn any Cause pending there at Common Law, and may transmit the Record of it into *B. R.* either after or before Issue or Demurrer joined, or both; and there the Record is to come entire: and it was said, the constant Practice is, that it shall not be remanded. For it is a known Rule, that when a Record comes into *B. R.* it shall never be removed out of the same Court.

SECT. V. *Of the Great Seal.*

IT follows that we speak of the Great Seal, and its Use, as it still remains a considerable Branch of the Office of Chancellor. It was objected, that the Great Seal of *England*, which is the Organ by which the Law is conveyed, is not powerful nor binding in *Scotland*; and therefore those born in *Scotland*, not inheritable to the Laws of *England*, &c.

But for the Matter of the Great Seal, the Judges shewed, that the Seal was alterable by the King at his pleasure, and he might make one Seal for both Kingdoms. For Seals, Coins, and Leagues, are of absolute Prerogative to the King without Parliament, not restrained

to

^a 4 Inst. 80. 2 Saund. 23. *Jeffreson, v. Morton adjudged.*

^b Moor 796. 804. 7 Co. 20. *by the three Chief-Justices in the Case of the Union of Scotland with England.* Salk. 510. *in the Case of the King and Queen, v. Knollys.* 2 And. 116.

to any Assent of the People. But for further Resolution of this Point, how far the Great Seal doth command out of *England*, they made this Distinction: That the Great Seal was current for Remedials, which groweth upon Complaint of the Subjects, and thereupon Writs are addressed under the Great Seal of *England*, which Writs are limited their Precinct, to be within the Places of the Jurisdiction of the Courts that must give the Redress of the Wrong; and therefore Writs are not to go into *Ireland*, nor the Isles, nor *Wales*, nor the Counties Palatine; because the King's Courts here have not Power to hold Plea of Lands or Things there. But the Great Seal hath a Power preceptory to the Person, which Power extendeth to any Place where the Person may be found: as an *Habeas Corpus*, which is a preceptory Writ, to have the Body of his Subject; and may be directed into *Scotland*, or any Place where the King hath Ministers; else how shall the King come by the Person of his Subject, whom he would command?

SECT. VI. *How to be made use of.*

BUT ^athe Lord-Keeper said, that though he had the Custody of the Great Seal, yet he could make no Use thereof, but according to the Course of the Court; and therefore could not put the Seal to a Writ of Error, till it had been first signed and allowed by Mr. Attorney: and he took it, that a Writ of Error in a criminal Matter, was *ex gratia Regis* in all Cases, but where

^a 1 Vern. Case 163. All. 414. *Crawle, v. Crawle.*
1. Vern. Case 168. *the Rioters Case.*

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where Provision is made for the same by the Statute; and is not due *ex Debito Justitiæ*, or *de Cursu*.

* And upon a Caveat being put in, to the passing of the Patent of the Office of Warden of the *Fleet*, upon hearing Counsel, the Court said, It is a Matter of great Consequence to the King, and to the Subject; should the Seal be put to this Patent, it might occasion a general Escape of all the Prisoners in the *Fleet*; and therefore would know his Majesty's Pleasure, before they would pass the Grant^b.

S E C T. VII. *The Chancery always open.*

THIS^c Court is *Officina Justitiæ*, out of which all original Writs, and all Commissions which pass under the Great Seal, go forth. Which Great Seal is *Clavis Regni*, and for those Ends this Court is ever open. And this Court is the rather always open, for that if a Man be wrongfully imprisoned in the Vacation, the Lord-Chancellor may grant an *Habeas Corpus*, and do him Justice, according to Law, where neither the King's-Bench, nor Common-Pleas can grant that Writ, but in the Term-time; but this Court may grant it either in Term-time or Vacation. So likewise, this Court

^a 2 Vern. Case 157. Col. Leighton's Case. 4 Ed. IV. 2.

^b See more of this Matter in a little Treatise called *Jus Sigilli, and Pryn's Plea for the Lords*. 2 Co. 17. Lane's Case 11 Co. 92. *The Earl of Devon's Case*. Co. Lit. 7. a. 2 Roll. Abr. 182, 183. Fitz. Nat. Brev. 65. 2 Inst. 555. Artic. super Chartas, cap. 6. Stat. 27 H. VIII. cap. 11. *Mod. Cases in Law and Equity*, fol. 47. Vernon, v. Benson. Moor 475. *The Queen*, v. Doddington. 1 Leon. 90. Sir Francis Englefield's Case. Dyer 177. Cater's Case. Cro. Cir. 369. Kemp, v. Barnard, 130. Keyley, v. Manning. 8 Co. 18. Dyer 179, 133.

^c 4 Inst. 85, 81. 2 Inst. 552. 2 Inst. 39, 40. *Crompton of Courts*, fol. 42. 4 Ed. IV. 22.

^d See 2 Inst. 52. sur Magna Carta, cap. 9.

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may

may grant Prohibitions at any time, either in Term or Vacation: which Writs of Prohibition are not returnable; but if they be not obeyed, then may this Court grant an Attachment upon the Prohibition, returnable either in the King's-Bench, or Common-Pleas.

* And as in Term-time some Days are exempted from Term Business, and some Portion of the Day from sitting in Courts; so in the Vacation-time, and Days exempted, some Law Business may be preferred, by express Permission of the Common Law, as Matters of Peace or Concord, suppressing of notorious Offenders, and Works of Necessity, & *ubicunque in mora promptum est periculum*. Upon these Reasons, the Admiral Court is always open, for that Strangers, Merchants, and Sea-faring Men, must take the Opportunity of Tides and of Winds, and of other Necessities, and cannot, without Ruin or great Prejudice, attend the Solemnities of Court. So likewise the Chancery, being a Court of Piety, is said to be always open: but this is to be understood, as it is *Officina Brevium & Consistorium Aequi & Boni*, not where 'tis *prætorium Juris communis*, and proceedeth in course of common Law; and so is the Book to be taken which says, that neither the Upper Bench, nor the Chancery are fixed Courts; and the Chancery may sit out of Term, at any Time when they please; and their not sitting in the Vacations, is for the Ease and Convenience of the People.

S E C T.

* Spelman of Terms, cap. 3. and in Gloss. tit. Cancellarius. Cro. Car. fol. 3. resolved by all the Judges.

† Styles 234. Burton, v. Law, ruled.

S E C T. VIII. *The Chancellor was in ancient Times the King's Chief Chaplain*

ANciently*, as we said before, only Churchmen and Bishops exercised this Office of the Chahcellorship, who had also the Care of the King's Chappel, and kept in their custody the sacred Monuments repositied there, called Rolls and Records. Hence it came about, that the Chancellor administred all Ecclesiastical Matters belonging to the King; disposed of the Churches; and, in the King's Name, performed the Office of^b Visitor: and he being the King's^c chief Chaplain, had not only the superior Care of his Chappel, but of his Chancery; for a spiritual Person was the more fit, after the Opinion of them in former Times, to give Advice according to Equity, and good Conscience. So that such as then sought Relief in Equity, were Suitors to the King himself, who being assisted with the Chancellor, did mitigate the Severity of the Law, in his own Person, when it pleased him to be present; and did in absence either refer it to the Chancellor alone, or to him and some other of the Council.

* Spelman's Gloss. tit. Cancellarius.

^b Crompton of Courts, fol. 47. Fitz. Nat. Brev. 42. 22 Ed. IV. 18. Plowd. 528.

^c Maddox's Hist. of the Exchequer, cap. 2. sect. 9. fol. 41, &c. Lambard's Archion, fol. 71, 72. Chaplains includes the Name of Clerks, and may be conventual; and the Masters in Chancery were formerly the King's Chaplains, and for their Preferment, the Chancellor had Disposition of all the King's Benefices under Twenty Marks per Annum Value. Lit. Rep. 95. The K. v. Brockham, &c. al. by the Reporter. Crompton of Courts, fol 54.

S E C T. IX. *How Appointed.*

M*Agistratum* * *creatio lege Regia in Imperatorem translata est*; and so in *England*, the Chancellor was wont to be appointed to his Office by the King, and the King is well apprized of all his Judges that he has in the Realm, as well spiritual as temporal. But the Chancellor was not in former Times perpetual, but to continue either two or three Years, oftentimes but for two, or one single Year; and sometimes there were many of them together, succeeding each other by Turns.

^b*Walter de Gray* (who was afterwards made Archbishop of *York*) in the Seventh Year of King *John*, gives to the King (as appears by the Words of the Record ^c) 5000 Marks for the Chancellorship of our Lord the King, during his Life, and for a Grant of the same by the King's Charter. ^dBut *H. III.* in the furious Times of the Barons Wars, made a Bargain with them, that the Chancellor, the Treasurer, and the Chief-Justice, &c. should be chose from Year to Year: which * Election, all the great Men
of

* *Crag. lib. 1. tit. 16. sect. 21. Maddox's History of the Exchequer, fol. 43. 2 H. IV. 10. 5 Co. 7, 8. in Cawdrey's Case. Spelman's Gloss. tit. Cancellarius. Maddox's History of the Exchequer, fol. 43. cap. 2. sect. 9. & fol. 46. Where he sets down some Instances how the Great Seal has at several Times been committed to Keepers, or otherwise laid up or disposed of. See Prynne's Opening of the Great Seal, and Lambard's Archion, fol. 56, 57.*

^b *Same. Cotton's Posth. 194, 195.*

^c *In dorso rotuli finium hujus Anni.*

^d *Sir Robert Cotton's View of the Reign of H. III. fol. 20. Spelman's Gloss. fol. 415. Matth. Westm. Anno Dom. 1265. Lambard's Archion.*

* *Rot. Parl. 15 Ed. III. Memb. 2. n. 14. It is prayed that the Election of the great Officers of the King, as Chancellor, Treasurer, &c. might be in Parliament. 2 Roll. Abr. fol. 164. Pl. 13. and see Pl. 14.*

of the Kingdom then asserted did belong by the ancient Law to the Parliament; and *Ranulph de Nevill*, Bishop of *Ely*, being Chancellor, refused (as *Matthew Paris* says) to deliver up the Seal to the King, when he demanded it; declaring, that he could by no means do this, when he had it given him by the Common Council of the Kingdom, &c. Yet the King took it away, and delivered it to several successively, to be kept by them; but the Profits as Chancellor remained still to *Ranulph*, by that Name: for the King himself had continued the Chancellorship to him, by his Charter dated 16 Nov. in the Thirteenth Year of his Reign, to hold during his Life. These things were done in troublesome Times, and of old: the more modern Election has been by the Kings alone; of whom, when *H. VIII.* had left the Care of this to his Counsellors, they thought fit to pass by the Bishops; but *Edward VI.* and *Queen Mary* were of a contrary Opinion.

* *Matth. Westm. in Ann. 1260.* *Matth. Paris, in Anno Dom. 1236.*





C H A P. II.

Of the Rise and Progress of the Chancery, as
a Court of Equity.

S E C T. I.



T^a remaineth then that we speak of his Court of Equity; which seems not altogether so ancient as the other.

¹. More generally.

The ^b Christian Princes being mindful of human Frailty, and desirous to take away all Objections in distributing Justice, took for their Council the Nobles and Barons, whom *Cassiodorus* calls the ^c lesser Senate. This was formerly observed very religiously, throughout all *Europe*. And from hence our ancient Kings used to ^d swear, before the whole Kingdom and Priesthood, that they would administer Justice and Judgment truly in their Kingdom, by the Advice of the Nobles. There is a multitude of Examples, in which the Kings in former Times determined the Causes brought to the Palace, not by the Advice of any one, but of the Nobles

^a Lambard's Archion, fol. 70.

^b Spelman's Gloss. tit. Cancellarius. Dugd. Orig. Juridic. cap. 17. Lambard's Archion, fol. 70, &c.

^c Aulam.

^d Leges Edouardi Confess. cap. 16.

Nobles in general. But being weary of so great a Load of Business, they were forced to trust the judicial Power to Persons delegated for that purpose. Upon this, having erected Courts separate from the Palace, they allotted each several Part to many, but left not any to one single Judge; conceiving, that Justice, as well as Truth, would be safer in the hands of many. Infomuch that even in ^a the inferior Courts in the Country, they suffered not any one to preside by himself. But those Causes, which being extraordinary, fell not under any of the ordinary and stated Jurisdictions, they determined should be brought to the Palace, as the Oracle of the Kingdom. For this end it was, that *Edward I.* who was a strict Observer of the ancient Course, provided by ^b Statute that the

^a Spelman of *Fendis*, cap. 6. Of the ancient Government of England, fol. 53.

^b Artic. super Chartas. 28 Ed. I. cap. 5. Same. Lambard's Archion. fol. 70, 129, 131.

But my Lord Coke says, he could find no Statute that gives the Party grieved Remedy in Equity. As for Articuli super Chartas, 28 Ed. I. cap. 5. That the Chancellor, and the Justices of the King's-Bench, were to follow the Court; that is to be intended only when they were required: for both the Chancery, and the King's-Bench, were at that Time settled Courts, during the several Terms of the Year, as by infinite Records doth appear. Nor was the Chancellor's Attendance required to assist in Matters of Equity, which had no Being then, but to seal Writs, and the like. 2 Inst. sur Artic. super Chart. cap. 5. 4 Inst. 73. 10 Co. 73. The first Parliament I find touching this Matter, is 17 R. II. cap. 6. And in the Roll of the same Parliament, I find the first Decree that ever I observed. Rot. Par. 17 R. II. Nu. 10. Joh. de Windsor's Case, which see there at large. 4 Inst. 82, 83. 2 Inst. 553, 554. So the Commons petition 3 H. V. Num. 46. against these Subpœnas out of the Chancery and Exchequer, of Matters determinable at Common Law, which never were granted, nor used before the Time of the late King Richard; that John Waltham, formerly Bishop of Sarum, of his Subtilty invented and begun such Novelty, &c. 1 Rol. Abr. 371, 372. Same cited and argued, Cases in Equity, fol. 234. And in 14 R. II. the Parliament would not admit of Redemption. Hale's Hist. of the Common Law, fol. 46. The Case at large, 1 Ch. Caf. 219. per Hale.

But

the Chancellor and Judges of the King's-Bench, should be constantly attendant upon his Court; that the one might declare what the Law was, the other give Advice in Matters of Equity: so that the King, by their joint Assistance, might not err in giving Judgment. But the succeeding Kings being engaged in continual Wars and Troubles, and often forced to cross the Sea, were obliged to leave this Province to a Consistory of Nobles, who were of their Council, with whom they themselves are always supposed present. And especially to the Chancellor, who was at the head of them, as well upon the account of his consummate Wisdom and Prudence, as of his Nearness to the King, and his great Skill in Affairs.

But it is worth our Enquiry, whether at this time of day, he alone had the Cognizance of Causes? For in the First Year of *Edward III.* the Bounds of the Forest of *Windsor* being in contest, he had certain of the Nobility of the Kingdom joined with him, and they all sat in the very Court of Chancery; for so it was then called. And by a Statute of the Twentieth Year of the same King, the Power of enquiring into Extortioners, and Fomenters of other Men's Suits, and many more such Delinquents, was not given to him alone, but together with the Treasurer. Afterwards, in the Thirty-ninth Year of his Reign, when he decreed a Judgment given in Affize of *Novel Disseisin*, void, but in vain; he

But for a perpetual Law, and for the true Jurisdiction of this Court, see Stat. 15 H. VI. cap. 4. 4 Inst. 83.

Yet it encreased most of all, when Cardinal Wolsey was Lord Chancellor of England, Anno 8 H. VIII. and continued until the 21 Year of the same King; of whom the old Saying was verified, That great Men in judicial Places will never want Authority. 2 Inst. 553. And see the Articles against him.

he was assisted by the Treasurer, and others of the King's Council. But however this Matter was, (*viz.* either by flinging off his Associates, or they declining it) the Jurisdiction remained at last with him alone; and by the Statute 36 *Ed. III. cap. 9.* many things were left to his Cognizance only. (And by this Statute^a, the Chancellor was not only made sole Judge in this newly erected Court, but was enabled also to proceed in Judgment thereafter, by his own Discretion; for otherwise, the Words, *Without other Suit*, were not beneficial.^b)

The Exercise of this Power therefore growing more frequent, and many more being cited and delayed in Chancery, than seemed just and reasonable, the People petitioned in^c Parliament, in the Fourth Year of *H. IV.* to put some Restraint upon it by a Law, but did not prevail: yet the King answered graciously, that he would give Orders that it should be done more sparingly for the future. Something like this is said to have been moved in the Parliament, in the first Year of *H. VI. viz.* that no one should apply to the Chancellor, without a Certificate of two of the King's Judges, that he had no Remedy by the Law of the Land.

But there happened about this Time a sort of publick Necessity, which required the Aid of a Court of Equity. For by reason of the incertain State of Affairs in the Kingdom, there was^d hardly a Man that had not conveyed over his Estate to Trustees: who often breaking

^a Lambard's Archion, fol. 72, 73.

^b See a great Number of these Petitions in 1 *Rol. Abr.* 371. And Lambard's Archion, 152, 153.

^c Petit. Parl.

^d 15 *H. VII.* 13. b. per Frowike, *Chief-Justice.*

their Trust, Recourse was had to the Chancery; and upon their Application, a due Remedy obtained. And truly as these be the first Beginnings, that are to be found in Statute-Law, concerning this Authority of the Chancery Court; so also, it does not appear that in our Reports of Common Law, there is any mention of Causes before the Chancellor for Help in Equity, but only from the Time of King *H. IV.* in whose Days, by reason of these intestine Troubles, Feoffments to Use did either first begin, as some have thought, or else did first grow common and familiar, as all Men must agree*. Yet for Experience there was nothing more usual in Obits, and such Conveyances are as ancient as *R. II.*'s Time. But these being invented by the Clergy to evade the Statute of *Mortmain*, this Court was complained of by the Laity; till the Wars of *Lancaster* and *York* made it necessary for them too to put their Lands in Trust, to save them from Forfeiture.

The Chancery upon this began to extend its Jurisdiction, and daily encreasing by a new Accession of Causes; whatsoever favoured of Rigor, or Breach of Faith, or evil Conscience, was brought into this Court: and what the Professors of the Law most complained of, the very Judgments of their Courts were called in question. Not that it is lawful to infringe them, or at any time to avoid them, (for this is forbid both by the ancient positive Law and by the Statutes of the Realm) but, as being given according to the strict Rules of Law, they often

* Lambard, fol. 74, 75. Bacon's *Reading on the Statute of Uses*, fol. 20, 14, 10. *Law of Uses*, fol. 3. Poph. 78. in *Chudleigh's Case* per Popham, Chief-Justice.

* Same, Lit. Rep. 37. Anon.

ten are contrary to Equity, the Plaintiff is restrained from carrying them into Execution; and thus the Judgment remains unimpeached: but is rendered altogether useless and ineffectual.

*This extraordinary Prerogative, a certain Chancellor in old Times granted more sparingly, nay often refused, as threatening the very Being of the Laws of his Country; but his Successors were more tenacious of it. And from hence, formerly Quarrels arose, and of late Suits. King *James* therefore at last, ordered the Records and Memorials of the Chancery to be examined into; and it appearing by many Instances, that the Chancellors made use of this Jurisdiction from the beginning of the Reign of *H. VII.* he confirmed it by his Privy-Seal, dated 18 July, 1616.

SECT. II. *Objections answered.*

BUT^b here we have mighty Adversaries to encounter withal, the which maintaining with their whole Force the ordinary Jurisdiction, will in no wise yield to any such absolute and unbridled Authority. And therefore first of all, that great Charter of the Liberties of *England*, which we may call the first Letters of Manumission of the People of this Realm, out of the *Norman* Servitude, doth by the Mouth of the King, among other Freedoms, specify this one; *Nullus liber Homo capiatur vel imprisonetur aut disseissetur de libero tenemento suo vel liberis consuetudinibus suis, aut utlagetur, aut exu-*

* Lib. de Diversite des Courts. Cary juxta fin.

^b Lambard's Archion, fol. 125.

let, aut aliquo modo destruat, nec super eum ibimus nec super eum mittimus, nisi per legale Judicium parium suorum vel per legem Terræ. By pretence of which Grant, many have since thought themselves freed from that irregular Power which the former Kings, and their Council of Estate, had exercised upon their Subjects; and fancied that they ought not henceforth to be drawn to answer in any Case, except it were by way of Indictment, or by Tryal of good and lawful Men, being their Peers, after the Course of the Common Law: whereas indeed these Words of the Statute are to be understood of the Restitution then made of the ordinary Jurisdiction in common Controversies, and not for Restraint of the absolute Authority, serving only in a few rare and singular Cases.

* Again, in that the Commons of the Realm assented first in the Parliament, 28 *Ed. I. cap. 5.* that the Chancellor and the Justices of the King's-Bench should follow the King wheresoever he went, to the end that he might always have at hand, Men learned, and able to advise him in such Cases as he admitted to the hearing; yet soon afterwards in the Parliament 25 *Ed. III. cap. 4.* 28 *Ed. III. cap. 31.* (such is the Weakness and Imperfection of Man) the Subject which so desirously fled to the King and his Council for Succour, did as hastily retire and run back to the ordinary Seat and Judge again. Also for the utter Discouragement, and beating down of all such as used to prefer unto the King any Accusations, Suggestions, or Petitions against other Men, a further Law was made by the Parliament, 37 *Ed. III. cap. 18.* that they should

*Lambard's Archion, fol. 144, 145, 129.

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should be sent with their Suggestions before the Chancellor, Treasurer, and the King's Great Council, and should put in Sureties of Taliasion; that is, to incur the same Pain that the other should have, in case the Suggestion were found untrue. But one Year's Experience made that point to be softened, by the introducing a new Law, 38 *Ed. III. cap. 9.* which taking away the Taliasion, gave order that such false Suggesters should be imprisoned only, until they had both made full Agreement with the Party molested, and Fine and Ransom with the King; and then within a few Years after, these Accusations grew still more and more odious, so that it was decreed by the Parliament, 42 *Ed. III. cap. 3.* that if any thing should be done in that behalf, contrary to the old Law of the Land, the same should be void in the Law, and holden for Error. Nevertheless, these Complaints were yet again thought fit to be admitted, and thereupon, the Statute 17 *R. II. cap. 6.* willed the Chancellor alone should have Power by his Discretion, to to award Damages against any Person that should make untrue Suggestions against another, before the King's Council. Which Authority the Chancellor exercised many Years together, till at length his Writs of *Subpœna* flew so thick abroad, for Matters determinable at the Common Law, that he also was charged not to exceed the Bounds of Authority delivered unto him; so that the Parliament, 15 *H. VI. cap. 4.* stayed the granting of the *Subpœna*, until that Surety were found to answer to the Party grieved, as well his Damages as Expences, if that the Matter should not be made good, that was contained in the Bill of Complaint against him.

But

But in all this whole Proceeding of the Statute-Law in this Matter, as well as the Petitions upon which they were made, it is covertly confessed, that Complaints upon just Causes, might be moved before the King and his Council, and that the Commons of the Realm sought only to be delivered from Troubles and Costs, that grew by unjust Accusations. And although the Commons have seemed in some other Parliaments, generally, and without any Exception, to impugn this royal Prerogative, yet have the Kings always most gravely and considerably repelled that sort of Attempt.

* So that whensoever this Court of Equity took beginning to be a distinct Court, it is most certain, that the Power thereof was always in exercise.

And with this agrees *Doctor and Student*^b, who says, that Equity is not set as a special Ground of Law, but rather as a thing permitted, and not prohibited; because there is no Record of it in the King's Courts. But it seems, that if a Statute were made against it, such Statute would be against Right and Conscience.

SECT. III. *Equity a special Trust in the King, and to be administred only by the Chancellor, in his Name.*

NOW that part of Jurisdiction which is called Equity, being opposite to regular Law, and, in a manner, an arbitrary Disposition, is still administred by the

^a Lambard's Archion, fol. 75.

^b Doctor and Student, cap. 17

^c Hobart 63. in the Case of Martyn, v. Marshall & Key. S. P. as judged by Sir C. Wray, and the Court, B. R. 4 Inst. 87. in Perrott's Case. S. P. resolved 12 Co. 114. in the Earl of Derby's Case.

the King himself, and his Chancellor in his Name, *ab initio*; as a special Trust committed to the King, and not by him to be committed to any other. And so it was said by Serjeant *Hitcham* to have been resolved by *Poph. Anderson, Gawdy, and Walmsley*, that the King could not grant to the now Queen to hold a Court of Equity. And that also it could not be by Prescription, for the King can't grant any thing in derogation of the Common Law. But *tenere Placita* according to the Course of the Law, may be granted and prescribed; and the Chancery in *London*, and the Cinque-Ports, are by Parliament. And there in the Margin it is said, *Nota*, this Resolution is against the Court of Requests.

^b So in *Oxford*, their Jurisdiction is by the Charters of 14 R. II. and 14 H. VIII. confirmed by an Act of 13 Eliz. ^c But the Exchequer has had a Chancellor and Seal, time out of mind, and some have collected from thence, that there should also be in the Exchequer, a Court of Equity, before the Statute of 33 H. VIII. cap. 39. and then it must be a Court of Equity by Prescription, for we find no former Act of Parliament that doth create and establish any such Court; and if it be by Prescription, then judicial Precedents in Course of Equity must guide the same.

^d So a Prohibition was prayed to the Dutchy Court, for holding Plea by *English* Bill of L^s in the County Palatine, and *Hale* C. J. said, That the Constitution of a Chancellor don't constitute a Court of Equity. For there is a Chancellor of the Garter, and there was a Chancellor

^a *Stepney, v. Loyd*, Cro. El. 647.

^b 2 Vent. 362. *Sir Tho. Draper, v. Dr. Crowther*. 1 Ch. Caf. 237-
Pratt, v. Taylor.

^c 4 Inst. fol. 118, 119.

^d 2 Lev. 24. *Fisher, v. Patten*.

lor of the Court of Augmentations, and yet neither of them ever held a Court of Equity. And he said, that the Statute of *Ed. IV.* don't give them a Court of Equity, but a Court of Revenue. But how their Court of Equity came to be holden, don't plainly appear, but perhaps it might be begun in the Time of *H. V.* before the Statute of *Ed. IV.* but he and *Twisden* agreeing, that it might be inconvenient to examine their Power, after so long Continuance and Practice, as by the Precedents now produced, it appears to have been used, denied the Prohibition.

F I N I S.

